U.S. SENATE Established 1947
Republican Policy Committee

No. 14 March 7, 2003

S. 3 — Partial-Birth Abortion Ban Act of 2003

Calendar No. 19
Read a second time and placed on the Senate Calendar on February 24, 2003. No written report.

NOTEWORTHY

- Under a unanimous consent agreement reached on March 6, the Senate will begin consideration of S. 3 on Monday, March 10 at 5 p.m. S. 3 was introduced on February 14, 2003 by Senator Santorum, and currently has 43 cosponsors. On February 24, the measure was placed on the Calendar under the Senate's Rule 14.

- S. 3 amends the Federal criminal code to prohibit any physician or other individual from knowingly performing a "partial-birth abortion" – defined as an abortion in which the person partially delivers a living fetus and kills the fetus before completing delivery, with exceptions in the case of the life of a mother endangered by a physical disorder, illness, or injury.

- The 104th Congress was the first to consider legislation banning partial-birth abortions. While the measure passed both chambers, it was vetoed by President Clinton. The House of Representatives overrode the President's veto but the Senate sustained it. A similar scenario occurred during the 105th Congress. Legislative attempts to ban the procedure also were made during the 106th and 107th Congresses. In the 106th, legislation passed both houses but the two bills never went to conference. In the 107th, the House passed legislation on July 24, 2002, but the Senate did not take up a partial-birth ban bill. This year, legislation has again been introduced in the House (H.R. 760) and is pending before the House Judiciary Committee.

- Possible amendments to S. 3 include a Durbin substitute providing an exception for such procedures in order to preserve the "health" of the mother, and a Harkin Sense of the Congress amendment stating Senate support and approval of the Supreme Court's decision in *Roe v. Wade*. [See Possible Amendments section for discussion.]

- Over the past eight years, at least 31 states have enacted their own partial-birth abortion bans. However, according to the Congressional Research Service, "many of these statutes have not taken effect because of temporary or permanent injunctions.[1]

[1] "Partial-birth Abortion: Recent Developments in the Law," Congressional Research Service, February 28, 2003.

HIGHLIGHTS

- S. 3 prohibits the performance of a partial-birth abortion, which is specifically defined in the bill as "an abortion in which the person performing the abortion: 1) deliberately and intentionally vaginally delivers the living fetus until, in the case of a head-first presentation, the entire fetal head is outside the mother's body, or, in the case of a breech presentation, any part of the fetal trunk past the navel is outside the mother's body; and 2) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus."

- According to this definition, the prohibition established in S. 3 would *not* apply to abortions performed by Caesarian section or hysterotomy (i.e., where the fetus is not extracted vaginally); or to abortions in which the fetus is killed *prior* to being moved into the birth canal.

- The person performing such an abortion would be subject to fines or imprisonment of up to two years, or both. The mother of the aborted fetus is explicitly exempted from prosecution. In addition, the person performing the abortion is liable for civil damages to the father of the aborted child and, if the mother is under 18 years old, the maternal grandparents of the child.

- The prohibition does not apply to a partial-birth abortion that is "necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury."

BACKGROUND

Senate consideration of S. 3 will mark the fourth time that the Senate has taken action on partial-birth-abortion legislation since 1995. Since that initial consideration, the legislation has been refined over time to include a more precise definition of the prohibited procedure, as well as factual findings. In particular, the legislation has been modified to ensure its constitutionality in light of the Supreme Court's ruling in *Stenberg v. Carhart* (2000).

Overview of Legislative History

S. 3 is similar to legislation considered in previous years and differs only in minor details. The specifics are as follows:

107th Congress: On June 19, 2002, Representative Steve Chabot introduced The Partial-Birth Abortion Ban Act (H.R. 4965). The bill was passed by the House on July 24, 2002, by a vote of 274-151. The Senate did not consider similar legislation.

106th Congress: On October 5, 1999, Senator Santorum introduced The Partial-Birth Abortion Ban Act (S. 1692). The bill passed the Senate on October 21, 1999, by a vote of 63-34. Similarly, the House passed legislation (H.R. 3600) on April 5, 2000, by a vote of 287-141. While a conference was requested, and conferees were appointed, no further action took place.

105th Congress: H.R. 1122 passed the Senate on May 20, 1997, with amendments, by a vote of 64-36. On October 8, 1997, the House (which had originally passed the bill on March 20, 1997, by a vote of 295-136) agreed to the Senate amendments by a vote of 296-132 and sent the bill to President Clinton, who vetoed it and returned it to the House (which was the originating house). On July 23, 1998, the House overrode the President's veto by a margin of 296-132 (two-thirds of those present and voting is required) and sent the veto message to the Senate. On September 18, 1998, the Senate vote to override failed, 64 to 36 (three votes short of the necessary margin).

104th Congress: President Clinton vetoed H.R. 1833 on April 10, 1996. The veto override vote succeeded in the House (285 to 137) on September 19, 1996, but failed in the Senate (58 to 40) on September 26; the measure initially had been approved by the Senate on December 7, 1995, by a vote of 54 to 44.

In addition to the federal legislative efforts summarized above, many states have enacted partial-birth abortion ban statutes, but federal courts have issued injunctions or restraining orders blocking enforcement in many cases.

Adjustments in Light of Supreme Court Decision

The U.S. Supreme Court decided *Stenberg v. Carhart*, 530 U.S. 914 (2000), striking down Nebraska's statute banning partial-birth abortion. The Court held that the statute unduly burdened a woman's constitutional right to choose abortion because it (a) contained no health of the mother exception in light of the district court findings in that case, and (b) could be construed to apply to a broad range of abortion procedures rather than just the partial-birth abortion targeted in S. 3. However, the Court expressly held that the Constitution does not give doctors "'unfettered discretion' in their selection of abortion methods." 530 U.S. at 937.

S. 3 has been modified to protect it against constitutional challenges under *Stenberg*. First, S. 3's sponsors interpret *Stenberg* to require a health exception only due to the particular district court findings in that case. In fact, the evidence shows that partial-birth abortion is never necessary to protect the health of the mother, and S. 3 contains extensive findings to that effect. Second, S. 3 defines "partial-birth abortion" much more narrowly than did that Nebraska statute so that it will not be misinterpreted to extend beyond the narrow circumstances intended.

Background on the Partial-Birth Abortion Procedure

Partial-birth abortion, the procedure prohibited under S. 3, is a method that is employed from approximately the mid-point in pregnancy, i.e., the second trimester. It is a method commonly referred to as "dilation and extraction" or "D & X" in the medical field. On June 16, 1995, the *Los Angeles Times* described the procedure as follows:

> "The procedure requires a physician to extract a fetus, feet first, from the womb and through the birth canal until all but its head is exposed. Then the tips of surgical scissors are thrust into the base of the fetus' skull, and a suction catheter is inserted through the opening and the brain is removed."

Opponents often claim that the partial-birth or "dilation and extraction" procedure is very rare. Based on self-reporting of abortion providers, the Alan Guttmacher Institute estimates that 2,200 partial-birth abortions occurred in 2000.[2] The Supreme Court in *Stenberg* speculated that the number may be as many as 5,000. 530 U.S. at 929.

False Claim: Preserving the "Health" of the Mother

In previous veto messages, President Clinton claimed that the legislation did not contain an exception clause to help preserve the "health" of the mother. Opponents have since used this argument as justification for continued opposition to the bill. However, this claim was refuted in an op-ed ["Partial-Birth Abortion Is Bad Medicine," *The Wall Street Journal*, 9/19/96] by four specialists in OB/GYN and fetal medicine representing PHACT (Physicians' Ad Hoc Coalition for Truth), a group of over 500 doctors, mostly specialists in OB/GYN, maternal and fetal medicine, and pediatrics, including former Surgeon General C. Everett Koop, as follows:

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[2] Lawrence B. Finer & Stanley K. Henshaw, "Abortion Incidence and Services in the United States," Alan Guttmacher Institute, January 2003. See also *The Sunday Record* (Bergen County, NJ), September 15, 1996:

> Interviews with physicians who use the method reveal that in New Jersey alone, at least 1,500 partial-birth abortions are performed each year. ... Another [New York] metropolitan area doctor who works outside New Jersey said he does about 260 post-20-week abortions a year, of which half are by intact D&E [i.e., partial-birth abortion]. The doctor, who is also a professor at two prestigious teaching hospitals, said he had been teaching intact D&E since 1981, and he said he knows of two former students on Long Island and two in New York City who use the procedure.

See also ABC "Nightline," February 26, 1997: "Based on these revelations, as well as the admission of abortion lobbyist Ron Fitzsimmons, it is now believed that the actual number of partial-birth abortions performed nationwide per year is at least in the range of 3,000 to 5,000, with only some 500 to 750 (approximately 15 percent) occurring in the third trimester."

- Among the health risks of the partial-birth procedure pointed to by the PHACT physicians: intentionally and dangerously causing a breech delivery during the procedure; risking injury to the mother by forcing the scissors into the child's head while it is still in her body; and "incompetent cervix," the leading cause of future premature deliveries.

- They also deny that fetal abnormality would ever indicate partial-birth abortion to safeguard maternal health or fertility: "In some cases, when vaginal delivery is not possible, a doctor performs a Caesarian section. But in no case is it necessary to partially deliver an infant through the vagina and then kill the infant." That is, despite opponents' claims, ending a pregnancy does not translate into the need to kill a partially delivered fetus – as opposed to completing the delivery of a live infant.

BILL PROVISIONS

S.3 amends Title 18 of the United States Code (Crimes and Criminal Procedure) to create a new provision (Chapter 74): "Partial-Birth Abortions: Section 1531. Partial-birth abortions prohibited."

Subsection (a)

This subsection provides that whoever, in or affecting interstate or foreign commerce, "knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than two years, or both. This paragraph shall not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury. This paragraph shall become effective one day after enactment."

Subsection (b)

"Partial-birth abortion" is defined as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery. . ." As used in this section, the term "vaginally delivers a living fetus before killing the fetus" means deliberately and intentionally delivering into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician knows will kill the fetus, and killing the fetus.

Subsection (c)

This subsection establishes a civil cause of action against a person performing an abortion in violation of this section on the part of the father of the aborted fetus, and if the mother has not attained the age of 18 years, on the part of the maternal grandparents of the aborted fetus. Civil relief may include "money damages for all injuries, psychological and physical, occasioned by the violation" and "statutory damages equal to three times the cost of the partial-birth abortion." Civil relief is not available if the pregnancy is the result of the plaintiff's criminal misconduct (e.g., where the father had

impregnated the mother by rape, or where the maternal grandfather had impregnated the mother by incest) or if the plaintiff had consented to the abortion.

Subsection (d and e)

This subsection consists of a broad grant of immunity to the mother against any action arising out of the performance of the partial-birth abortion.

ADMINISTRATION POSITION

At press time,the Administration had not released its Statement of Administration Policy, but the Administration is expected to support the passage of S. 3 in unamended form.

COST

No cost estimate for S. 3 is available, but during consideration in previous Congresses, CBO estimated that "enacting this legislation would have no significant impact on the federal budget" [see, for example, H. Rept. 107-604, page 26].

POSSIBLE AMENDMENTS

At least two amendments are anticipated at this time: a substitute by Senator Durbin similar to one he introduced in 1999, and an amendment by Senator Harkin calling on the Senate to affirm its support for *Roe v. Wade*.

The Durbin Substitute

The Durbin Substitute is an attempt to gut the effect of S. 3 under the guise of providing a "health exception." In fact it will have no effect on the continued use of this procedure, and should be rejected. In 1999, the Durbin Amendment included the following key text, with emphasis added:

(a) IN GENERAL- It shall be unlawful for a physician to intentionally abort a ***viable fetus*** *unless the physician prior to performing the abortion--*

> *(1) certifies in writing that, in the physician's medical judgment based on the particular facts of the case before the physician,* ***the continuation of the pregnancy would threaten the mother's life or risk grievous injury to her physical health;*** *and*
>
> *(2) an independent physician who will not perform nor be present at the abortion and who was not previously involved in the treatment of the mother certifies in writing that, in his or her medical judgment based on the particular facts of the case, the continuation of the pregnancy would threaten the mother's life* ***or risk grievous injury to her physical health.***

Definitions

> *In this chapter:*
>
> *(1) GRIEVOUS INJURY —*
>
> > *(A) IN GENERAL- The term "grievous injury" means*
> >
> > > *(i) a severely debilitating disease or impairment specifically caused by the pregnancy; or*
> > >
> > > *(ii) an inability to provide necessary treatment for a life-threatening condition.*
> >
> > *(B) LIMITATION- The term "grievous injury" does not include any condition that is not medically diagnosable or any condition for which termination of pregnancy is not medically indicated.*

The Durbin Substitute Amendment should be rejected for two primary reasons:

First, the above language **would not apply to most partial-birth abortions** because the large majority of the procedures are believed to be performed during the second trimester, and the term "viable" will likely be read by courts to include only third-trimester abortions.

Second, the **purported "health" exception in fact limits no partial-birth abortions** by the plain language of the amendment. The language states that the physician need only conclude that continuing the pregnancy would "risk grievous injury to her physical health." Because ***every*** continued pregnancy places ***some*** risk of grievous injury upon a pregnant woman, this language creates no limitation at all. As one abortion provider, Dr. Warren Hern of Colorado, has stated, "I will certify that

any pregnancy is a threat to a woman's life and could cause grievious injury to her physical health."[3] Thus, the plain language of the amendment provides a loophole that any doctor can slip through.

When the Durbin substitute amendment was proposed in 1999, a motion to table the amendment carried 61-38. Senate Record Vote #335, 106th Congress, 1st Session.

The Harkin Amendment

It is also possible that Senator Harkin will attempt to amend the bill with a statement in support of *Roe v. Wade*. His 1999 amendment reads:

> (a) FINDINGS.--Congress finds that--
>
> (1) reproductive rights are central to the ability of women to exercise their full rights under Federal and State law;
>
> (2) abortion has been a legal and constitutionally protected medical procedure throughout the United States since the Supreme Court decision in *Roe v. Wade* (410 U.S. 113 (1973));
>
> (3) the 1973 Supreme Court decision in Roe v. Wade established constitutionally based limits on the power of States to restrict the right of a woman to choose to terminate a pregnancy; and
>
> (4) women should not be forced into illegal and dangerous abortions as they often were prior to the Roe v. Wade decision.
>
> (b) SENSE OF CONGRESS.--It is the sense of the Congress that--
>
> (1) Roe v. Wade was an appropriate decision and secures an important constitutional right; and
>
> (2) such decision should not be overturned.

When the Harkin amendment was introduced in 1999, a motion to table failed 48-51, and it was agreed to by the Senate 51-47. Senate Record Votes 336 & 337, 106th Congress 1st Session.

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[3]Ruth Padawer, "Clinton May Back Abortion Measure," *The Record,* May 14, 1997.